No. 84219

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

vs.

BASSAM A. SAFFAF,

Appellant.

Appeal from the Circuit Court of Jefferson County,
State of Missouri
The Honorable Gary P. Kramer, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

JEREMIAH W. (JAY) NIXON
Attorney General

ANNE E. EDGINGTON
Assistant Attorney General
Missouri Bar No. 50303

Post Office Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
Attorneys for Respondent

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JURISDICTIONAL STATEMENT

This is an appeal from the denial of a motion to withdraw a guilty plea in the Circuit Court of Jefferson County, Missouri. The underlying conviction was for the Class D felony of criminal nonsupport, pursuant to § 568.040, RSMo 1994, for which imposition of sentence was suspended and appellant was placed on five years of probation. The Court of Appeals, Eastern District, dismissed appellant's appeal for lack of jurisdiction in **State v. Saffaf**, No. ED78832 (Mo.App., E.D. October 23, 2001). This Court now has jurisdiction because the Eastern District, on its own motion, transferred the case to this Court pursuant to Supreme Court Rule 83.04. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Bassam Saffaf, hereinafter "appellant," was charged by information on April 13, 1999, in the Circuit Court of Jefferson County, Missouri, with the Class D felony of criminal nonsupport (L.F. 8).[1] The Honorable Gary P. Kramer accepted appellant's guilty plea, imposition of sentence was suspended, and appellant was placed on five years of probation (L.F. 4, 9-10).

On September 11, 2000, appellant filed a *pro se* motion to set aside his guilty plea (L.F. 11-12). The trial court denied this motion on October 16, 2000, following a hearing on the motion (L.F. 13; Supp.Tr. 1). An Amended Judgment was entered on November 15, 2000 (L.F. 14). Appellant filed his Notice of Appeal with the Court of Appeals, Eastern District, on November 27, 2000 (L.F. 15-16).

On March 7, 2001, the Court of Appeals issued an Order to Show Cause as to why appellant's appeal should not be dismissed for lack of a final appealable judgment on the ground that appellant had received a suspended imposition of sentence (E.D. Order March 7,

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[1] The Record on Appeal consists of a legal file ("L.F."); a transcript of appellant's guilty plea ("Tr"); and a transcript of the evidentiary hearing on appellant's petition to set aside his guilty plea ("Supp.Tr."). Additionally, respondent will cite orders issued by the Court of Appeals, Eastern District, as "E.D. Order" followed by the date on which the order was issued. Finally, references to appellant's substitute brief filed with this Court will be cited as "Sub.Br."

2001). Appellant responded to the Court of Appeals' Order to Show Cause on March 22, 2001, claiming that he was not appealing from a suspended imposition of sentence, but rather from the denial of a motion to withdraw a guilty plea under Rule 29.07(d). On March 28, 2001, the Court of Appeals dismissed appellant's appeal for lack of an appealable judgment (E.D. Order March 22, 2001).

On March 30, 2001, Appellant filed a Motion to Reinstate Appeal. The Court of Appeals granted appellant's motion on April 18, 2001, specifically instructing appellant to address the court's prior decision in **State v. Shambley-Bey**, 989 S.W.2d 681 (Mo.App., E.D. 1999)(E.D. Order April 18, 2001).

Appellant filed a new Notice of Appeal on April 26, 2001 and filed his Amended Appellant's Brief on May 17, 2001.

On October 23, 2001, the Court of Appeals dismissed appellant's appeal for lack of jurisdiction in **State v. Saffaf**, No. ED78832 (Mo.App., E.D. October 23, 2001). The court held as follows:

> Bassam A. Saffaf ("Movant") pled guilty to the class D felony of non-support of a child. He was placed on probation for five years with imposition of sentence suspended. Movant filed a motion to set aside his guilty plea pursuant to Rule 29.07(d) claiming he did not knowingly and voluntarily enter his guilty plea. The trial court denied his motion, and he now appeals from the denial of his motion to withdraw his guilty plea. We dismiss the appeal.
>
> The facts in this case are similar to the facts in State v. Shambley-Bey,

989 S.W.2d 681 (Mo.App. 1999). In Shambley-Bey, we held that no appeal lies from the trial court's order denying a motion to withdraw a guilty plea where the court did not pronounce sentence on the plea, but rather suspended imposition of the sentence. Id. at 681.

A suspended imposition of sentence in a criminal case is not a final judgment for purposes of appeal as no sentence has been entered. State v. Lynch, 679 S.W.2d 858, 860 (Mo.banc 1984). Without a final judgment, we lack jurisdiction to entertain this appeal. Id.[2]

We acknowledge that Movant, by receiving a suspended imposition of sentence, is prevented at this time from receiving appellate review of the denial of his motion to withdraw his guilty plea. Appellate review, however, must be conferred by statute and is not a matter of right. Section 512.020 RSMo 2000; Rule 81.01; Houston by Houston v. Teter, 705 S.W.2d 64, 65 (Mo.App. 1985).

The appeal is dismissed.

On January 16, 2002, the Court of Appeals transferred the instant case to this Court on its own motion pursuant to Supreme Court Rule 83.02. The court's order reads as follows:

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[2] Further, without a final judgment, we are prohibited from reviewing whether the court abused its discretion in denying Movant's motion to withdraw his guilty plea and cannot address the merits of his claim that he did not knowingly and voluntarily enter his plea of guilty.

> This Court issued an opinion on October 23, 2001 dismissing appellant's appeal from the denial of a motion to withdraw a guilty plea for lack of an appealable judgment.
>
> On November 20, 2001, the Western District issued an opinion in State v. Fensom, WD59302 which appears to be in conflict with the opinion herein. In addition, further research has disclosed a case, not cited in either the Western District opinion or this opinion, State v. Davis, 438 S.W.2d 232 (Mo. 1969). Davis holds that a motion to withdraw a guilty plea is in the nature of a civil action.
>
> On the Court's own motion, pursuant to Rule 83.02, this case is transferred to the Missouri Supreme Court because of the general interest or importance of a question involved and for the purpose of reexamining existing law. The appellant's Motion for Rehearing and/or Transfer to the Missouri Supreme Court is denied as moot.

(E.D. Order January 16, 2002). As a result of this order, the present case is now before this Court.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF AN APPEALABLE JUDGMENT BECAUSE APPELLANT HAS NO FINAL JUDGMENT IN APPELLANT'S CRIMINAL CASE FROM WHICH TO APPEAL IN THAT THE COURT SUSPENDED IMPOSITION OF APPELLANT'S SENTENCE AND PLACED HIM ON PROBATION FOR FIVE YEARS. A FINAL JUDGMENT IS REQUIRED IN APPELLANT'S CRIMINAL CASE BEFORE APPELLANT MAY APPEAL THE TRIAL COURT'S DENIAL OF HIS RULE 29.07 MOTION BECAUSE OF THE INTEGRATED NATURE OF THE CRIMINAL CASE AND THE RULE 29.07 MOTION.

Appellant is attempting to appeal from the denial of his Rule 29.07(d) motion to withdraw his guilty plea. Appellant pled guilty to the Class D felony of criminal nonsupport on June 28, 1999 in the Circuit Court of Jefferson County and was placed on five years of probation with the imposition of sentence suspended (L.F. 9-10).

A. Factual Background

Following his plea of guilty, appellant filed a motion to set aside his guilty plea pursuant to Rule 29.07(d) claiming he did not knowingly and voluntarily enter his guilty plea (L.F. 11-12). The trial court denied appellant's motion, following a short evidentiary hearing, and appellant appealed the court's decision to the Court of Appeals, Eastern District (L.F. 13, 15-16; Supp.Tr. 1). On October 23, 2001, the Court of Appeals dismissed appellant's appeal for a lack of jurisdiction, explaining its decision as follows:

A suspended imposition of sentence in a criminal case is not a final judgment for purposes of appeal as no sentence has been entered. State v. Lynch, 679 S.W.2d 585, 860 (Mo.banc 1984). Without a final judgment, we lack jurisdiction to entertain this appeal. Id.

We acknowledge that Movant, by receiving a suspended imposition of sentence, is prevented at this time from receiving appellate review of the denial of his motion to withdraw his guilty plea. Appellate review, however, must be conferred by statute and is not a matter of right. Section 512.020 RSMo 2000; Rule 81.01; Houston by Houston v. Teter, 705 S.W.2d 64, 65 (Mo.App. 1985).

This appeal is dismissed.

State v. Saffaf, No. 78832 (Mo.App., E.D. October 23, 2001).

On January 16, 2002, however, the Court of Appeals issued an Order transferring the presentt case to this Court, pursuant to Rule 83.02. The Order reads as follows:

This Court issued an opinion on October 23, 2001 dismissing appellant's appeal from the denial of a motion to withdraw a guilty plea for lack of an appealable judgment.

On November 20, 2001, the Western District issued an opinion in State v. Fensom, WD59302 which appears to be in conflict with the opinion herein. In addition, further research has disclosed a case, not cited in either the Western District opinion or this opinion, State v. Davis, 438 S.W.2d 232 (Mo. 1969). Davis holds that a motion to withdraw a guilty plea is in the nature of a civil

action.

> On the Court's own motion, pursuant to Rule 83.02, this case is transferred to the Missouri Supreme Court because of the general interest or importance of a question involved and for the purpose of reexamining existing law. The appellant's Motion for Rehearing and/or Transfer to the Missouri Supreme Court is denied as moot.

(E.D. Order January 16, 2002).

B. Appellant must wait for a final judgment in his criminal case before he can appeal because the 29.07 motion and the criminal case are intertwined.

The issue presently before this Court is whether Rule 29.07(d) should continue to be construed as requiring appellant to wait until a final judgment is entered in his criminal case before he may appeal the denial of the motion under that rule, or whether he can appeal it at any time, regardless of the status of the underlying criminal case.[3] Respondent submits that appellant must wait until a final judgment is entered in his criminal case before he can attack the trial court's ruling in that case because the language of Rule 29.07(d) does not contemplate

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[3] *See* **State v. Shambley-Bey**, 989 S.W.2d 681 (Mo.App., E.D. 1999); **State v. Ortega**, 985 S.W.2d 373 (Mo.App., S.D. 1999); and **State v. Waters**, 882 S.W.2d 269 (Mo.App., S.D. 1994) for the proposition that a final judgment in an appellant's criminal case is a prerequisite to appellate review in the Rule 29.07 context when imposition of sentence has been suspended. *But see* **State v. Kluttz**, 813 S.W.2d 315 (Mo.App., E.D. 1991).

such separate treatment, as the motion and the criminal case are so extensively intertwined by the nature of the proceedings.

The procedure to withdraw a guilty plea is set out in Rule 29.07(d):

> A motion to withdraw a plea of guilty may be made only before sentence is imposed or when imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Supreme Court Rule 29.07(d).

The language of Rule 29.07(d) supports the construction that there is a necessary linkage between appellant's motion to withdraw a guilty plea and an appellant's criminal case. First, the simple fact that Rule 29.07 permits an appellant to file a motion at the same time that his criminal case is pending is a strong indication that the two are so intertwined that they should be treated as one in the same. In the situation where an appellant files a motion to withdraw his guilty plea during his criminal case, there is no expectation that the motion will be treated separately from the criminal case; for example, appellant is not entitled to separate counsel simply because he has filed a 29.07 motion. The linkage between the motion and the criminal case is further illustrated by the fact that Rule 29.07 motions are routinely filed as part of normal proceedings in a criminal case. Here, as is often the case, appellant's motion was filed with the same criminal case number, "CR-198-0321-FX-J2," and was styled the same as the criminal case, "State of Missouri v. Bassam A. Saffaf" (L.F. 11-12). Moreover, there is no reason that a Rule 29.07 motion should be treated any differently from any other

motion that could be filed that *would* be considered part of the criminal case, for example a Motion for Continuance or a Motion for Change of Venue.

The Court of Appeals' holding in **State v. Fensom**, No. 59302 (Mo.App., W.D. November 20, 2001), illustrates the absurd results that would occur if Rule 29.07 were construed to allow appeals of an appellant's motion to withdraw a guilty plea prior to sentencing. In **Fensom**, the appellant entered a plea of guilty and, before the court had even made a sentencing determination, filed a motion to withdraw his guilty plea pursuant to Rule 29.07(d). Appellant then appealed the court's denial of his motion and as of yet the trial court has not made any sort of sentencing determination. A Motion for Rehearing or Transfer has been filed by the State with the Western District on the grounds that the court's opinion overlooked law and is in conflict with previous decisions of the appellate courts. Appellant's Motion is currently pending with the Court of Appeals, Western District.

It is well-settled in Missouri that no appeal can be taken in a civil or criminal case without a final judgment. **Pulitzer Publ'g Co. v. Transit Casualty Co.**, 43 S.W.3d 293, 298 (Mo.banc 2001); **Williams v. Williams**, 41 S.W.3d 877, 878 (Mo.banc 2001); **State v. Burns**, 994 S.W.3d 941, 942 (Mo.banc 1999). A final judgment is normally defined as one that resolves all issues in a case, leaving nothing for future determination. **State v. Eisenhouer**, 40 S.W.3d 916, 918 (Mo.banc 2001). A motion to withdraw a guilty plea, by the very nature of Rule 29.07 itself, does not necessarily resolve all issues in a plea.

In the present case, because there has not yet been a sentence imposed, there is an issue left for the future judgment of the trial court. Therefore, appellant does not yet have a right

to appeal the denial of his motion to withdraw his guilty plea, and the Court of Appeals does not have jurisdiction to review appellant's claims. Appellant's appeal should be dismissed for lack of jurisdiction.

II.

SHOULD THIS COURT CHOOSE TO REVIEW APPELLANT'S CLAIM ON APPEAL AND NOT DISMISS FOR LACK OF AN APPEALABLE JUDGMENT, THE MOTION COURT DID NOT CLEARLY ERR IN DENYING APPELLANT'S RULE 29.07 MOTION TO WITHDRAW HIS GUILTY PLEA, FOLLOWING AN EVIDENTIARY HEARING, ON HIS CLAIM THAT HIS PLEA WAS INVOLUNTARY ON THE GROUNDS THAT (1) HE DID NOT ADEQUATELY UNDERSTAND WHAT WAS GOING ON AT HIS PLEA HEARING AND (2) THAT HIS PLEA COUNSEL WAS INEFFECTIVE FOR INSISTING THAT HE PLEAD GUILTY WITHOUT UNDERSTANDING THE CONSEQUENCES OF HIS PLEA AND WITHOUT THE ASSISTANCE OF AN INTERPRETER, BECAUSE APPELLANT FAILED TO PRODUCE EVIDENCE SUPPORTING EITHER CLAIM AT HIS EVIDENTIARY HEARING.

In his second point on appeal, appellant contends that the motion court erred in denying his Rule 29.07 motion to withdraw his plea of guilty because his plea was not "voluntarily and understandingly made" because of his poor English skills and the ineffective assistance of his plea counsel (Sub.Br. 18). Specifically, appellant argues that his plea counsel was ineffective for insisting that he plead guilty without understanding the consequences of his plea and without the assistance of an interpreter (Sub.Br 18-19).

Appellant filed his motion to set aside his guilty plea on September 11, 2000 (L.F. 11-12). An evidentiary hearing on his claims was held on October 16, 2000 (Supp.Tr. 1). Appellant appeared *pro se* at the hearing and was accompanied by an unidentified individual

purporting to act as a translator (Supp.Tr. 1). When asked by the motion court to produce evidence on his claims, appellant declined (Supp.Tr. 3). Appellant's testimony was as follows:

> **The Court**: Do you have any evidence to present on this petition.
>
> **The Defendant**: (Confers with unidentified individual).
>
> **The Court**: Pardon me?
>
> **Unidentified Individual**: He said the court papers from the trial, the court papers.
>
> **The Court**: From the proceedings?
>
> **The Defendant**: Yes.
>
> **The Court**: The transcript of it?
>
> **The Defendant**: Yes.
>
> **The Court**: Other than that transcript of the plea proceedings do you have any other evidence that you wish to introduce on this matter?
>
> **Unidentified Individual**: (Confers with Defendant.) He says the lawyer he had, he was the one who tell him that he has to say yes or say no and he wasn't understanding what was going on, what was being asked.

(Supp.Tr. 2-3). The motion court then reviewed the record of appellant's guilty plea hearing and denied appellant's motion to set aside his plea (L.F. 13-14; Supp.Tr. 5). The motion court found as follows:

> Defendant's Motion to Set Aside Guilty Plea called on October 16, 2000. State appears by Marc Fried, Assistant Prosecuting Attorney. Defendant

appears in person and with his friend Mohanad Mahrous to translate. Arguments presented. Court Reviews transcript of Guilty Plea. Whereupon the Court denied the Defendant's Motion.

(L.F. 14).

The standard of review for a trial court's denial of a Rule 29.07 motion was stated in **State v. Pendleton**, 910 S.W.2d 268, 270 (Mo.App., W.D. 1995), as follows:

> A defendant does not have an absolute right to withdraw a guilty plea. **State v. Mandel**, 837 S.W.2d 571, 573 (Mo.App., 1992). Such relief should be granted by a motion court only upon a showing that the relief of withdrawal of the plea is necessary to correct manifest injustice. **State v. Hasnan**, 806 S.W.2d 54, 55 (Mo.App., 1991). In reviewing the denial of a motion to withdraw guilty plea pursuant to Rule 29.07, the reviewing court is to determine whether the trial court abused its discretion or was clearly erroneous. **Scroggins v. State**, 859 S.W.2d 704, 706 (Mo.App. 1993). It is the burden of the defendant to prove by a preponderance of the evidence that the motion court erred. Id. at 706-07.
>
> If appellant's plea of guilty was voluntary and was made with an understanding of the charges against him, there can be no manifest injustice inherent in the plea. **Winford v. State**, 485 S.W.2d 43, 49 (Mo. banc 1972); **Scroggins**, 859 S.W.2d at 707. If a defendant is misled or induced to enter a plea of guilty by fraud, mistake, misapprehension, coercion, duress or fear, he

or she should be permitted to withdraw the plea. **Latham v. State**, 439 S.W.2d 737, 739 (Mo. 1969); **Scroggins**, 859 S.W.2d at 707. "Unawareness of certain facts at the time of a plea does not necessarily render the plea unintelligent or involuntary." Id.; **State v. Nielsen**, 547 S.W..2d 1153, 161 (Mo.App., 1977). **Pendleton**, 910 S.W.2d at 270.

The motion court was not clearly erroneous for the simple reason that appellant failed to present evidence at his evidentiary hearing supporting his claims that his plea was involuntary. Where, as here, the movant asserts that his attorney was ineffective in some respect, the movant must show that counsel's performance did not conform to the degree of skill and diligence of a reasonably competent attorney and that movant was thereby prejudiced. **State v. Jones**, 979 S.W.2d 171, 180 (Mo.banc 1998), cert. denied 525 U.S. 1112, 119 S.Ct. 886 (1999); **State v. Brooks**, 960 S.W.2d 479, 497 (Mo.banc 1997), cert. denied 524 U.S. 957, 118 S.Ct. 2379 (1998). Here, appellant made no such showing as he produced no evidence whatsoever about counsel's alleged ineffectiveness at his evidentiary hearing. Moreover, appellant presented no evidence indicating that he was unable to understand what was going on at his guilty plea proceedings.

Because appellant produced no evidence, the motion court looked to the record of appellant's evidentiary hearing in making its determination that appellant's plea was voluntary. The motion court did not err as the record of appellant's guilty plea proceeding indicates that appellant knowingly, intelligently, and voluntarily plead guilty to criminal nonsupport. At the proceeding, appellant testified that he was not threatened in any manner, that no one was

forcing him to plead guilty, and that he fully understood the ramifications of his plea (Tr. 8-12). Thus appellant's own testimony refutes his contentions that he did not make his plea voluntarily.

Likewise the record refutes appellant's contention that he was unable to understand English sufficiently to understand the consequences of his plea. Appellant contends in his brief that his plea counsel induced him to plead guilty by instructing him to answer "yes" or "no" without understanding the consequences and by excluding appellant's interpreter from the room (App.Br. 15-16). However, the record indicates that appellant gave answers other than "yes" or "no" at the proceeding and that he coherently answered questions that were asked of him that required responses other than "yes" or "no." For example, appellant testified as follows:

Q: Are you pleading guilty because you are, in fact, guilty?

A: (Nods head.)

Q: How old are, Mr. Saffaf?

A: Forty-eight.

Q: Are you currently married?

A: Yes.

Q: How many children do you have?

A: I have four.

Q: In addition to the child that's the subject of this case?

A: Yes – No. I have four children.

Q: Four children altogether?

A: (Nods head).

Q: What are their ages?

A: One that just become eighteen and I have one that's eight, one that's five and the one that's - - -

Q: How far did you go in school, sir?

A: High school.

Q: I take it you're able to read and write English.

A: I read very slow.

(Tr. 8-9). Appellant's responses certainly indicate that appellant has the ability to understand and comprehend the English language. Thus, it follows that appellant understood the questions posed at his guilty plea hearing and that his plea was entered voluntarily.

In **Garces v. State**, 862 S.W.2d 509, 511 (Mo.App., S.D. 1993), the defendant contended that his counsel was ineffective and that his interpreter was inadequate because he could not understand her. The court denied appellant's motion finding that the appellant's contentions were refuted by the record of his guilty plea. Id. Specifically, the court found that the record indicated that appellant did sufficiently understand his interpreter, holding as follows:

> Movant's answers, under oath, were all responsive to the questions and revealed no confusion in understanding all the questions by the court. For example, movant responsively gave his age, residence, length of marriage, employer's

> name, and the extent of his education. When asked about his children, movant said he had "one on the way." Movant does not contend his answers were inaccurate. Had movant not understood his interpreter, at least some of his answers would have been unresponsive, thus indicating a lack of understanding of the questions propounded. Movant points to nothing in the record which reveals he misunderstood any question or where he gave an unresponsive answer.

Id. at 511. In the instant case, as noted above, appellant's responses to the questions posed by the court *were* responsive to the questions asked and, thus, it naturally follows that appellant was not merely saying "yes" or "no" as allegedly instructed by his counsel, rather he was contemplating his answers and responding in a manner consistent with his own thoughts.

Appellant cites **State v. Sultan**, 14 S.W.3d 96, 98 (Mo.App., E.D. 2000) in his brief; however, **Sultan** can be distinguished. In **Sultan**, the Court of Appeals reversed the denial of a Rule 29.04(d) motion because the defendant, an Iraqi who had only lived legally in the United States for one year, had shown that while he knew some English, his plea was not effective. Id. at 99. However, at Sultan's plea proceeding his testimony was troubling and indicated that he understood very little English. The Court of Appeals noted as follows:

> While many of the answers to the judge's questions were "yes, I understand," a disturbing number were "no, I don't understand." At one point he told the court that he liked "prison." When asked, "what is prison?" defendant stated "You mean do I like the United States?"

Id. at 99. In the instant case, as noted above, we have no such instances of incoherent

responses or any indication that appellant did not understand the questions asked of him.

Moreover, this Court should note that in appellant's request for relief he asks the Court to remand the case for an evidentiary hearing. Such relief is not warranted because appellant already received such a hearing. *See* Supp.Tr. 1, Hearing on Appellant's Petition to Set Aside Guilty Plea conducted on October 16, 2000.

Therefore, because appellant presented no evidence at his evidentiary hearing that his plea was involuntary and the record of his plea refutes his contention that he was unable to understand English sufficiently to make a voluntary plea, appellant has failed to show that the motion court clearly erred. Therefore, this Court should affirm the judgment of the motion court and deny appellant's 29.07 motion to withdraw his plea of guilty.

CONCLUSION

In view of the foregoing, respondent requests that this Court dismiss appellant's appeal for lack of jurisdiction. In the alternative, should this Court choose to review appellant's claim, respondent submits that the denial of appellant's motion under Rule 29.07 following an evidentiary hearing should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

ANNE E. EDGINGTON
Assistant Attorney General
Missouri Bar No. 50303

Post Office Box 899
Jefferson City, Mo 65102-0899
(573) 751-3321
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains _____ words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 25th day of February, 2002, to:

Henry Robertson
Attorney at Law
1927 Mitchell Place
St. Louis, Missouri 63139

JEREMIAH W. (JAY) NIXON
Attorney General

ANNE E. EDGINGTON
Assistant Attorney General
Missouri Bar No. 50303

Post Office Box 899
Jefferson City, Mo 65102-0899
(573) 751-3321
Attorneys for Respondent